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9 **Pro Hac Vice*

10 *Attorneys for Plaintiff and the Classes*

11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **OAKLAND DIVISION**

14 **ABANTE ROOTER AND PLUMBING,**
15 **INC.**, individually and on behalf of all others
similarly situated,

16 Plaintiff,

17 v.

18 **UNLOCKED BUSINESS STRATEGIES,**
19 **INC.** a New York corporation, **THOMAS R.**
20 **COSTA**, an individual, and **MERCHANT**
INDUSTRY, LLC d/b/a SWIPE4FREE, a
New York limited liability company,

21 Defendants.

Case No. 4:19-cv-07966-JST

DECLARATION OF TAYLOR T.
SMITH IN SUPPORT OF
PLAINTIFF'S RESPONSE IN
OPPOSITION TO DEFENDANT
MERCHANT INDUSTRY LLC'S
MOTION TO DISMISS PURSUANT
TO FED. R. CIV. P. 12(b)(1) AND
12(b)(2)

Date: In Chambers
Time: In Chambers
Judge: Hon. Jon S. Tigar
Courtroom: 6, 2nd Floor

22
23 I, Taylor T. Smith, declare as follows:

24 1. I am an attorney with the law firm Woodrow & Peluso, LLC and an attorney of
25 record for Plaintiff Abante Rooter and Plumbing, Inc. ("Plaintiff" or "Abante").
26
27
28

1 2. On December 4, 2019, Plaintiff filed the instant action against Defendant
2 Unlocked Business Strategies, Inc. (“UBS”) alleging wide-scale violations of the Telephone
3 Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA” or “Act”). (Dkt. 1.)

4 3. The initial complaint was subsequently amended on two occasions. First, on
5 February 17, 2020, Plaintiff filed its First Amended Complaint, which named Thomas R. Costa
6 (“Costa”) as an additional defendant. (Dkt. 15.) Second, on April 20, 2020, Plaintiff filed its
7 Second Amended Complaint naming Merchant Industry, LLC d/b/a Swipe4Free (“Merchant
8 Industry”) (collectively with UBS and Costa “Defendants”) as an additional defendant. (Dkt. 25.)

9 4. During Plaintiff’s pre-suit investigation, counsel reviewed emails from UBS
10 received by Plaintiff dated August 29, 2020. (*See* UBS Email, a true and accurate copy of the
11 email is attached hereto as Exhibit 1.) The email was sent as a follow up email to the August 28,
12 2020 call.

13 5. Attached to the UBS Email were two brochures advertising Merchant Industry’s
14 products and services. (*See* Merchant Industry Brochures, true and accurate copies are attached
15 hereto as Exhibit 2.)

16 6. During a subsequent email communication on August 29, 2020, Richie Smyth
17 further explained Merchant Industry’s relationship with processors, including TSYS, First Data,
18 and Clover POS. (*See* Exhibit 1.)

19 7. Merchant Industry’s website details how an individual or entity becomes an
20 independent sales organization of Merchant Industry. (*See* Merchant Industry Webpage, a true
21 and accurate copy of Merchant Industry’s website, <https://swipe4free.com/partner/>, as of October
22 2, 2020 is attached hereto as Exhibit 3.)

23 8. On August 21, 2020, counsel for Costa and UBS contacted Plaintiff’s counsel via
24 email regarding the instant case.

25 9. On September 30, 2020, following a series of email communications, counsel for
26 Costa and UBS confirmed the existence of a lead generation company that has some involvement
27

1 with the subject telephone calls. At this time, UBS and Costa have not identified the lead
2 generation company.

3 I declare under penalty of perjury under the laws of the United States of America that the
4 foregoing is true and correct. Executed on October 9, 2020, in Denver, Colorado.

5
6 By: /s/ Taylor T. Smith

7 Taylor T. Smith*
8 tsmith@woodrowpeluso.com
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Exhibit 1



fred poor <fredpour60@gmail.com>

CASH DISCOUNT FOLLOW UP

Richie Smyth <richie@unlockedbiz.com>

Thu, Aug 29, 2019 at 12:18 PM

To: fred poor <fredpour60@gmail.com>

TSYS and First Data are the actual processors, meaning at the end of each business day they are the ones that transfer all of the money from your customer accounts to your account daily.

The primary difference between the two is really for us as processors. The only difference for a merchant is if you want to use the Clover POS system. First Data created Clover, and they keep it as an exclusive product for themselves so you have to use First Data if you want the Clover POS.

The difference for us is one of them assumes the financial risks of the transactions, meaning if you, as a merchant, have a customer that does a chargeback for 1,000 they will assume that risk instead of forcing me as the agent to assume it, while the other will pay me a higher commission and forces me to assume the risk. This is of course assuming you as the merchant do not pay the chargeback, which basically only happens in fraud cases. If you are planning to stay open as a business, then you would assume the chargeback risks first always. This really is only a risk for situations where large ticket items are sold or money is collected in advance of services being rendered or goods being delivered.

With the TSYS platform, since we are assuming the risk of the chargebacks, we underwrite our own deals which can be done in 24 hours, so if you would like to switch over we can do that much quicker with TSYS. With First Data, we have to send your application directly to them for underwriting which could take several days for approval.

Best,

Richie Smyth

On Thu, Aug 29, 2019 at 2:17 PM fred poor <fredpour60@gmail.com> wrote:

When i went to the website, it says TSYS and First Data. What is your relationship with TSYS?

On Thu, Aug 29, 2019 at 10:52 AM Richie Smyth <richie@unlockedbiz.com> wrote:

Hey,

We are selling the Swipe4free product as one of their affiliates. All of the customer service, product management, and services are rendered by Swipe4free, we are simply one of their ISO's. Think of UnlockedBiz as a Franchisee of Merchant Industry, which owns the Swipe4Free product.

Below are some attachments of the overall program we offer. We of course also offer traditional merchant processing and guarantee to beat the rates you currently pay. Let us know if you are interested in getting on another call to discuss the cash discount program further and what times work for you.

Best,

Richie Smyth

On Wed, Aug 28, 2019 at 5:23 PM fred poor <fredpour60@gmail.com> wrote:

Hello

I thought you are from Swipe4free. I am so confused.

On Wed, Aug 28, 2019 at 2:00 PM Richie Smyth <richie@unlockedbiz.com> wrote:

Hi Mr. Abante,

We received your inquiry about our Unlocked Payments technology.

Let me know when you'd like to schedule a time to discuss this further. for more information on the technology.

You can also visit us at <https://www.unlockedbiz.com/payment-solutions>

It will briefly explain how the Unlocked Payments technology is already saving business owners tens of

| | | | |
|--|--|--|--|
| | | | |
| | | | |
| | | | |
| | | | |

thousands of dollars and how it can help you do the same.

Best Regards,
Richie Smyth

Exhibit 2

The Solution to All of Your Processing Needs

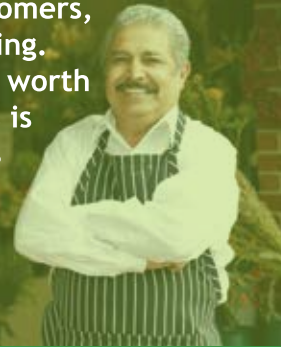
- ✓ Bluetooth / EMV Phone Swipers
- ✓ Virtual Terminals
- ✓ POS Solutions
- ✓ Web Transactions
- ✓ Wireless Terminals
- ✓ Phone Apps

The Guarantee

If at any point you decide that Swipe4Free is not right for your business, we will switch you back to traditional credit card processing at a reduced rate.



"They charge 4% to my customers, so I don't have to pay anything. If a customer purchases \$10 worth of goods, I receive \$10. This is one amazing service and it's completely free for merchants!"



Industries Already Using Swipe4Free



Deli & Supermarket



Restaurants



Pizzerias



Bars & Nightclubs



Salons & Spas



Retail



Service Industries



Wholesale



Medical & Legal

WWW.SWIPE4FREE.COM | 1-855-345-0040



"Food & labor costs are constantly increasing. Swipe4Free helped me recover those increased costs by eliminating my credit card processing fees."



"Thanks to Swipe4Free. I'm able to manage higher minimum wage laws for my employees."



"My family's cost of living was going up and I needed to increase the amount of money I took home. Swipe4Free allowed me to instantly increase my profits and cover my family's overhead."

SALES REP: _____

PHONE NUMBER: _____

EMAIL ADDRESS: _____

WWW.SWIPE4FREE.COM | 1-855-345-0040

Stop Giving Away Your Hard Earned Profits to Your Processor

Eliminate Your Fees Today!



WWW.SWIPE4FREE.COM | 1-855-345-0040

Aren't You Tired of

- Your processor taking 3% - 4% of your credit / debit card sales
- Increasing credit card rates and junk fees
- Unnecessary miscellaneous fees
- Paying for your customer's incentives - airline miles, cash back, gifts, rewards, and more
- Losing customers because of your credit card minimum signs
- Growing employee minimum wages

The Solution Has Arrived!

Swipe4Free will increase your profits quickly and easily by eliminating your credit / debit card fees.

- Next Day Funding
- POS Systems for All Business Types
- Tip Enabled
- EBT & EMV Enabled Equipment
- Accepts All Credit / Debit Card Types
- 100% Compliant with All State Laws
- English and Spanish Support Available

A Brand You Can Trust

With over 10 years in the Credit Card Processing industry and over \$4 Billion in Annual Credit Card Processing Volume, Swipe4Free is your best choice.

Join the over 14,000 merchants currently processing with Swipe4Free today!

WWW.SWIPE4FREE.COM | 1-855-345-0040

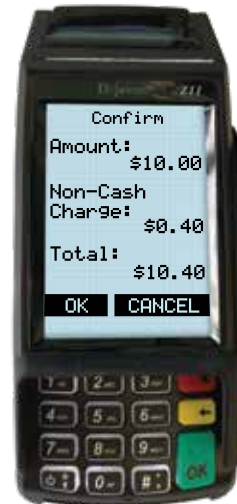
How it Works

EXAMPLE: \$10.00 Purchase

You enter
\$10.00 Sale Amount



Terminal Auto Calculates
4% Non-Cash Charge



How You Benefit

Transaction Process
\$10.00 (Sale Amount)
+ 0.40¢ (Non-Cash Charge)

You Receive
Full \$10.00 Sale Amount



4% (0.40¢)
Goes to Swipe4free
and covers:

- Interchange plus
- Transaction cost
- Authorization cost
- Support



MERCHANT BUSINESS NAME
MERCHANT ADDRESS
DATE TIME
CREDIT SALE:

TRANSACTION# *****
CARD TYPE MASTERCARD
ACCOUNT: ****0000
ENTRY CHIP
AMOUNT: \$10.00
NON-CASH CHARGE: \$0.40
TOTAL: \$10.40
REF NUMBER 12345678
AUTH CODE: 12345678
RESPONSE APPROVAL 123456

MODE
AID
TYR
IAD: 012345678940000000000000000000FF
TSI E00
ARC 00
APPN DEBIT MASTERCARD

I AGREE TO PAY ABOVE TOTAL AMOUNT
ACCORDING TO CARD ISSUER AGREEMENT
(MERCHANT AGREEMENT IF CREDIT VOUCHER)

X.....
CARD HOLDER NAME
MERCHANT COPY
THANK YOU!

WWW.SWIPE4FREE.COM | 1-855-345-0040

What You Get

Swipe4Free provides you with customer facing signage at no extra cost

CUSTOMER PRICING NOTICE

A 4% non-cash charge is applied to all store sales.

CASH DISCOUNT

As an incentive for customers, we now provide a discount to pay with cash or in-store gift card by giving a 4% immediate discount.

PAY BY CASH AND SAVE

We thank you for your patronage and continued support. It is our pleasure to serve you!



For more information: 1-855-345-0040 / www.Swipe4Free.com

Fee Comparison

| Fees | Swipe4Free | Traditional Credit Card Processing |
|---------------------|------------|---|
| Interchange Fee | WAIVED | 2-4% of Gross Credit Card Sales Volume* <small>*Varies by business and card type</small> |
| Transaction Fee | WAIVED | \$0.05 - \$0.25 Per Transaction |
| Authorization Fee | WAIVED | \$0.05 - \$0.25 Per Transaction |
| Statement Fee | WAIVED | \$5.00 - \$10.00 Per Month |
| TIN / IRS Fee | WAIVED | \$4.95 - \$9.99 Per Month |
| Monthly Minimum | WAIVED | \$25.00 - \$49.99 Per Month |
| Annual Fee | WAIVED | \$79.99 - \$199.99 Per Year |
| Online Access Fee | WAIVED | \$3.00 - \$15.00 Per Month |
| Express Funding Fee | WAIVED | \$9.95 - \$19.95 Per Month |
| ALL JUNK FEES | WAIVED | \$1.99 - \$199.99 Per Month |

WWW.SWIPE4FREE.COM | 1-855-345-0040



Your Local Processor That Offers the #1 Cash Discount Platform In the Nation

Top 10 Reasons to Use Cash Discounting

1

Cash Discounting is fully compliant with federal and state laws

The Durbin Amendment does not allow any payment card network to inhibit a merchant's ability to implement a cash discount.

2

The U.S. has the highest interchange rates

U.S. interchange rates are unregulated, allowing payment card networks (Visa, MasterCard, etc.) to charge what they want. Rates go up April 2019.

3

Raising your prices costs customers

It has been proven that raising prices costs far more customers than implementing a cash discount program.

4

Offset the rising minimum wage rate

States across the U.S. are raising minimum wage rates, especially in the tri-state area with New York at \$15/hour with New Jersey soon to follow.

5

Customers receive all the benefits from rewards cards

Cards like Chase Sapphire, Capital One Venture, Citibank Double Cash, & Capital One Savor continue to offer more rewards, costing merchants over 3.5%

6

To avoid annual fees and all other junk fees

Annual fees are just one example of a junk fee charged by your traditional credit card processor.

7

Removing Minimum Credit or Debit Card Signs

Cash Discounting removes the need to implement a minimum debit or credit card sales signs.

8

Stop sending customers to the ATM never to return

ATM fees are always higher than the 4% Non-Cash Charge. They can go up to \$4 for withdrawal plus other penalties charged by their bank.

9

Offset other constantly growing costs of doing business

From rising rent to inventory costs, the cost of doing business grows every year for merchants with no relief.

10

Customers appreciate having choices

Customers prefer to have choices, giving the customer the choice to pay in cash and save money is preferred to them having to pay higher prices.

Currently more than 99% of businesses accepting credit cards are on traditional programs. These businesses pay a variety of different daily, monthly, and annual Fees. In addition, they pay a percentage of all sales for the privilege of accepting credit and debit cards as a form of payment. When you add up all the fees and percentages that business owners are forced to pay, it comes out to anywhere from 3% – 4%+ of their gross credit / debit card sales.

Switch to Swipe4Free today and eliminate your entire credit card processing bill!

Exhibit 3



1.855.345.0040 |



Sales@Swipe4Free.com

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Join The Nation's #1 ISO & Agent Program Today!

What Is An ISO?

An ISO is an Independent Sales Organization. As an ISO of Swipe4Free, you will be opening up your own book of business as a 1099'd Independent Contractor with unlimited residualized income and commission potential.

Why Should You Become A Swipe4Free ISO?

Every single business and business owner is a potential client. For those of you who have experience selling for different companies in different industries you know that a big part of any sales job is finding the right prospects. When you decide to sell Swipe4free, you can sign up any business of any type and size. In today's market, everyone accepts credit and debit cards and let's face it what business is not looking to save money by eliminating those ridiculous credit card processing fees! Imagine selling something where you can walk into any business and offer them to get rid of one of their largest bills putting a lot of money back in their pockets! Business owners have it now harder than ever before to make a profit , imagine what they can do with all the savings you provide them!

Celebrity Entrepreneur & Investor Marc Portney for Swipe4...



What Kind of ISO Are You?

Swipe4Free provides individualized trainings based on your schedule and goals.

Let us help you succeed and build a residualized source of income that's limitless.

Looking To Make \$100,000 Within A Year With Endless Growth Opportunities

For the entrepreneur who's ready to start their own business, Swipe4Free gives you the opportunity to be your very own boss and create your own hours.

[Learn More](#)

Are You Looking To Create A Secondary Income While Working With Your Existing Relationships?

Create an additional source of monthly income by offering Swipe4Free services to your existing relationships and contacts

[Learn More](#)

Do You Want To Help Your Local Small Businesses Succeed?

If you're an active community member who shops local and wants to help businesses eliminate unnecessary fees, while expanding your relationships and creating a residualized income, Swipe4Free has the program for you.

[Learn More](#)

Already An ISO? Here's How We Can Help You Grow!
White Glove Service



- Custom Made Marketing
- 24/7 ISO Support Managers
- ISO Trainers
- Multitude of Weekly Trainings
- Residual Payment Specialists
- Newest Payment Technology
- Custom POS Integrations
- Lead Generation
- Appointment Setting
- Custom Proprietary CRM

Swipe4Free Will Build A Custom Residual & Bonus Compensation Package For You and Your Brand!

Services for All Levels of Experience

We understand that all ISO's needs are very different. We have created residual and bonus programs designed to help our ISO's maximize their individual opportunities and goals.

New To The Industry ISO's

We offer entry level training, high level support, and over two decades of industry knowledge to build your very own brand.

Join Today

Existing ISO's Looking To Expand

Grow your brand through white labeled marketing and our dedicated appointment setters providing you leads on a daily basis.

Join Today

Established ISO Offices

We provide you with the highest possible residual split, payment hierarchy for your team of ISO's, bonus structures, and 24/7 support.

Join Today

We Are A One Stop Shop For All Your Processing Needs

- ISO Support Managers
- ISO Trainers
- Marketing Department
- Residual Payment Specialists
- Risk & Underwriters
- Access to Management
- Lead Generation

- Over 60+ POS Integrations
- Equipment Leasing / Financing
- Proprietary Custom CRM and Mobile App
- Merchant Facing CRM
- Cash Advance In-House
- Custom EMV POS Systems for Cash Discounting and Surcharging

- In-House Marketing Department
- White Labeled Statements
- Custom Marketing Materials
- Web Design & Development
- Appointment Setting



ISO ACCESS
BUILD YOUR BUSINESS

ISO Access CRM

Mobile Custom Relationship Management App

Download our mobile app available on both Android and IOS devices giving you access to our custom built CRM on the go. You can service and answer all of your merchants questions and needs while mobile. Residuals, authorizations, transactions, chargebacks can all be handled at the tip of your fingers. Provide amazing support to both your merchants and your ISO's at your convenience.

- Marketing Materials
- POS & Terminal Inventory
- Equipment Prices
- Quote Tool
- Lease Calculator

[Find Out More](#)

Full Name*

Email Address*

Phone Number*

Company Name

City

Select a State ▼

How Did You Hear About Swipe4Free? ▼

Submit

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